

10 SOHRAB EZAZ,

11 Plaintiff,

12 v.

13 BAYVIEW LOAN SERVICING, LLC,

14 Defendant.

15 Case No. [5:17-cv-00821-EJD](#)

16 **ORDER GRANTING EX PARTE
17 APPLICATION FOR TEMPORARY
18 RESTRAINING ORDER**

19 Re: Dkt. No. 7

20 Sohrab Ezaz (“Plaintiff”) filed this action against Defendant Bayview Loan Servicing,
21 LLC (“Bayview”) on February 17, 2017, alleging several causes of action, including violations of
22 California Civil Code § 2923.6 and the California Homeowner Bill of Rights (“HBOR”). See
23 Compl., Dkt. No. 1. Presently before the court is Plaintiff’s *ex parte* Application for a Temporary
24 Restraining Order enjoining Bayview from proceeding with the trustee’s sale of Plaintiff’s
25 Property, which is presently scheduled for March 1, 2017 at 10:00 a.m. See Dkt. No. 7.

26 Based on Plaintiff’s Application and supporting materials, and for the reasons explained
27 briefly below, the Court GRANTS Plaintiff’s request for TRO. The court has jurisdiction over
28 this action pursuant to 28 U.S.C. § 1332(a)(1).

I. BACKGROUND

At all relevant times mentioned herein, Plaintiff has been the owner of the real property located at 6747 Hampton Drive, San Jose, CA 95120 (the “Property”). The Property is a single family home and is Plaintiff’s primary residence. Compl. ¶ 6, 7.

Plaintiff asserts that on April 21, 2005, he purchased the Property for \$1,100,000.00. Compl. ¶¶ 6, 8; TRO App. ¶ 7. Plaintiff made a down payment of 25% of the purchase price, and obtained a loan of \$825,000.00 from Countrywide Home Loans, Inc. (“the Loan”) for the remainder. Compl. ¶ 8 and Ex. 1 (Dkt. No. 1-1). The Loan had an adjustable rate, and when the market collapsed approximately four years later, Plaintiff states that he could not refinance or afford the increase in payments. Decl. of Sohrab Ezaz (“Ezaz Decl.”) ¶ 5, Dkt. No. 7-4. Accordingly, Plaintiff fell behind on his mortgage payments. Id.; Compl. ¶ 8.

Plaintiff further asserts that on or about January 15, 2017, he submitted “a complete loan modification application to Bayview’s loss mitigation department.” TRO App. ¶ 8. Plaintiff represents that Bayview accepted his application and assigned him a Single Point of Contact (“SPOC”) in connection therewith. Id. However, just over two weeks later on January 31, 2017 - and while Plaintiff’s application was purportedly still “under review” - Bayview filed a Notice of Trustee’s Sale (“NTS”) in the Santa Clara County Recorder’s Office. Compl. ¶ 10 and Ex. 2 (Dkt. 1-2); TRO App. ¶ 9. The sale is currently scheduled for 10:00 a.m. on March 1, 2017, which is less than 24 hours from the date and time this order issued. See id.

II. LEGAL STANDARD

The standard for issuing a TRO is the same as that for the issuance of preliminary injunction. See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977). Thus, a TRO, like a preliminary injunction, is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter v. NRDC, Inc., 555 U.S. 7, 22 (2008).

“To obtain a preliminary injunction, the moving party ‘must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary

1 relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest.”¹⁰
2 Idaho v. Coeur D’Alene Tribe, 794 F.3d 1039, 1046 (9th Cir. 2015) (quoting Pom Wonderful LLC
3 v. Hubbard, 775 F.3d 1118, 1124 (9th Cir. 2014)).

4 Alternatively, “‘serious questions going to the merits’ and a hardship balance that tips
5 sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the
6 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
7 public interest.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).
8 This articulation represents “one alternative on a continuum” under the “‘sliding scale’ approach
9 to preliminary injunctions employed” by the Ninth Circuit. Id. at 1131-32.

10 Whether to grant or deny a preliminary injunction is a matter within the court’s discretion.
11 See Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1132-33 (9th Cir. 1979).

12 III. DISCUSSION

13 An *ex parte* TRO Application must first satisfy Federal Rule of Civil Procedure 65(b)(1),
14 which demands that the opposing party or parties have been given notice. Plaintiff’s TRO
15 Application avers that his counsel provided notice to Bayview and its legal agents on February 26,
16 2017 by certified mail and by fax, as well as to Bayview’s assigned foreclosure Trustee. See Decl.
17 of Arasto Farsad (“Farsad Decl.”) ¶ 3, Dkt. No. 7-3. Thus, the court now turns to substantive
18 requirements for a TRO and the four Winter factors.

19 A. Irreparable Injury

20 Courts have repeatedly held that the loss of one’s home is sufficient to satisfy the element
21 of irreparable injury. See, e.g., Vazquez v. Select Portfolio Serv’g, 2013 WL 5401888, at *2
22 (N.D. Cal. 2013), Tamburri v. Suntrust Mortg., Inc., 2011 WL 2654093, at *2 (N.D. Cal. 2011);
23 Washington v. National City Mortg. Co., 2010 WL 5211506, at 15 (N.D. Cal. 2010); Bever v. Cal-
24 W. Reconveyance Corp., 2011 WL 5102759, at *2 (E.D. Cal. 2011). Here, if the foreclosure sale
25 proceeds and is successful, Plaintiff and his family could lose their home, which has been the
26 family’s primary residence since 2005. The court concludes that this potential loss is more than
27 sufficient to show that Plaintiff is likely to suffer irreparable injury if no temporary restraining
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1 order were issued.

2 **B. Balance of Hardships**

3 The balance of hardships also tips decidedly in favor of Plaintiff. As the court noted in
4 Tamburri, “it is hard to conceive of a serious hardship to Defendants [were a TRO to issue] ...
5 because any security they have in the real property would still remain,” provided the security is
6 valid. Tamburri, 2011 WL 2654093, at *2. On the other hand, were the foreclosure sale to
7 proceed absent a TRO from this court, Plaintiff and his family may lose their property and home.
8 “Such a balance between the interests of the homeowner and the party seeking to foreclose augurs
9 strongly in favor of the homeowner.” Castellanos v. Countrywide Bank NA, 2015 WL 914436, at
10 *2 (N.D. Cal. 2015); see also Cottrell, 632 F.3d at 1131.

11 **C. Likelihood of Success on the Merits**

12 To establish a likelihood of success on the merits, it not necessary for the moving party “to
13 prove his case in full,” or show that he is “more likely than not” to prevail. Univ. of Tex. v.
14 Camenisch, 451 U.S. 390, 395 (1981); Leiva-Perez v. Holder, 640 F.3d 962, 966 (9th Cir. 2011).
15 Instead, the moving party must demonstrate a “fair chance of success on the merits” or raise
16 questions “serious enough to require litigation.” Benda v. Grand Lodge of the Int'l Ass'n of
17 Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978). “No chance of success at
18 all, however, will not suffice.” Id. In the instant case, Plaintiff alleges that Bayview violated
19 California Civil Code § 2923.6 and the California HBOR when it recorded the NTS and sought to
20 conduct a trustee’s sale while Plaintiff’s first lien loan modification application was pending.
21 Compl. ¶ 15 TRO App. ¶ 19.

22 California Civil Code § 2923.6(c) provides that

23 If a borrower submits a complete application for a first lien loan
24 modification offered by, or through, the borrower’s mortgage
25 servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or
26 authorized agent shall not record a notice of default or notice of sale,
27 or conduct a trustee’s sale, while the complete first lien loan
modification application is pending. A mortgage servicer,
mortgagee, trustee, beneficiary, or authorized agent shall not record
a notice of default or notice of sale or conduct a trustee’s sale until
any of the following occurs:

1 (1) The mortgage servicer makes a written determination that the
2 borrower is not eligible for a first lien loan modification, and any
appeal period pursuant to subdivision (d) has expired.

3 (2) The borrower does not accept an offered first lien loan
4 modification within 14 days of the offer.

5 (3) The borrower accepts a written first lien loan modification, but
6 defaults on, or otherwise breaches the borrower's obligations under,
the first lien loan modification.

7 If a borrower's first application for a loan modification is denied, the borrower must also be
8 provided at least 30 days to appeal the decision before the loan servicer may record a notice of
9 default or notice of sale, or conduct a trustee's sale. §§ 2923.6 (d)-(f). The purpose of this statute is
10 to "prohibit deceptive and abusive home foreclosure practices," such as dual tracking, which
11 "occurs when a financial institution continues to pursue foreclosures even while evaluating a
12 borrower's loan modification application." Clinton v. Select Portfolio Serv'g, Inc., 2016 WL
13 7034895, at *5 (E.D. Cal. 2016) (quoting Foronda v. Wells Fargo Home Mortgage, Inc., 2014 WL
14 6706815, at *6 (N.D. Cal. 2014)).

15 Section 2923.6's prohibition against dual tracking is "given teeth" by section 2924.12,
16 which "provides remedies for a violation of section 2923.6 or other specified provisions of the
17 statutory scheme." Monterossa v. Superior Court of Sacramento Cty., 237 Cal. App. 4th 747, 753,
18 (2015), reh'g denied (July 6, 2015). Section 2924.12(a) provides,

19 (1) If a trustee's deed upon sale has not been recorded, a borrower
20 may bring an action for injunctive relief to enjoin a material
violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10,
2924.11, or 2924.17.

21 (2) Any injunction shall remain in place and any trustee's sale shall
22 be enjoined until the court determines that the mortgage servicer,
mortgagee, trustee, beneficiary, or authorized agent has corrected
23 and remedied the violation or violations giving rise to the action for
injunctive relief. An enjoined entity may move to dissolve an
injunction based on a showing that the material violation has been
24 corrected and remedied.

25 Cal. Civ. Code § 2924.12(a); see also Monterossa, 237 Cal. App. 4th at 753. Accordingly, courts
26 have granted injunctive relief where the borrower makes a preliminary showing that a loan
27 servicer has failed to comply with the relevant statutory foreclosure provisions.

1 Here, Plaintiff has submitted a declaration stating that

2 On or about January 15, 2017, I submitted a complete loan
3 modification application to Defendant, Bayview Loan Servicing,
4 LLC, through their loss mitigation department. They confirmed
5 receipt of my application and immediately assigned a Single Point
6 of Contact (“SPOC”) to assist me. My SPOC told me they would
not proceed with a foreclosure sale so long as I worked with them on
my application. He also stated that the Defendant wanted to help me
keep my home.

7 Ezaz Decl. ¶ 5. Notwithstanding the pending status of his application, Plaintiff contends Bayview
8 then “filed a Notice of Trustee’s Sale and set a foreclosure sale date of March 1, 2017.” Id. ¶ 6.

9 For pleading purposes, the court must accept Plaintiff’s allegations as true. Accordingly,
10 Plaintiff has plausibly alleged that Bayview recorded the NTS and sought to conduct a Trustee’s
11 Sale while Plaintiff had a complete first loan modification application pending, in violation of
12 § 2923.6(c) and the HBOR. The court notes that Bayview’s present alleged failure to comply with
13 § 2923.6 will not necessarily preserve a private right of action going forward, as Bayview could
14 undertake the required statutory steps before the litigation reaches the merits phase.¹ However, for
15 the purposes of the instant TRO Application, Plaintiff has satisfied his burden as to the likelihood
16 of success on the merits. See Clinton, 2016 WL 7034895 at *5 (finding that a borrower
17 sufficiently alleged that servicer violated § 2923.6(c) and HBOR where he alleged that the
18 defendant had recorded a NTS while the first loan modification application was pending);
19 Monterossa, 237 Cal. App. 4th at 750 (reviewing with approval superior court’s grant of a
20 preliminary injunction enjoining the trustee’s sale of petitioners’ home where petitioner had

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22 _____
23 ¹ As the appeals court explained in Monterossa:

24 As an example, in this case the respondent court found petitioners’ showing to be
25 undisputed that real parties “dual tracked” petitioners in violation of section 2923.6 by
26 recording a notice of trustee’s sale while petitioners’ first lien loan modification
application was pending. Rather than wait for trial on petitioners’ claim for a permanent
injunction, real parties could simply comply with the statutory scheme and then, if
necessary, move to dissolve the preliminary injunction in order to record a new notice of
trustee’s sale.

27 237 Cal. App. 4th at 754-55.

1 submitted a loan modification agreement but the servicer proceeded to recorded a notice of
2 trustee's sale on the property in violation of § 2923.6); see also Vazquez, 2013 WL 5401888, at *3
3 (finding that in the case of a wrongful foreclosure TRO application, “[g]iven that the balance of
4 hardships tips sharply in Plaintiff's favor, Plaintiff need only show serious questions going to the
5 merits in order to obtain a temporary restraining order.”).

6 **D. Public Interest**

7 Courts have consistently recognized and held that “it is in the public interest to allow
8 homeowners an opportunity to pursue what appear to be valid claims before being displaced from
9 their homes.” Sencion v. Saxon Mortg. Servs., LLC, 2011 WL 1364007, at *1 (N.D. Cal. Apr. 11,
10 2011); Vazquez, 2013 WL 5401888, at *3. Plaintiff has therefore met the fourth Winter factor.

11 **IV. ORDER**

12 Based on the foregoing, the court finds that Plaintiff has sufficiently satisfied the Winter
13 factors and, given how heavily the balance of hardships tip in his favor, concludes that it would be
14 in the public interest for a TRO to issue here. Thus, the court hereby GRANTS Plaintiff's *ex parte*
15 Application (Dkt. No. 7), and orders as follows:

16 1. Plaintiff shall **immediately** serve her Application and Order upon Defendant
17 Bayview, and file a certificate of service thereafter. This Order **shall have no effect unless**
18 Plaintiff files a certificate of service **by 9:00 a.m. on March 1, 2017**.

19 2. The Court HEREBY PROHIBITS Defendant Bayview from proceeding with the
20 sale of 6747 Hampton Drive, San Jose, CA 95120, currently scheduled to take place at the North
21 Market Street entrance to the County Courthouse, 191 North Market Street, San Jose, CA 95113
22 on March 1, 2017 at 10:00 a.m., until further order by the court.

23 3. The court finds, pursuant to Rule 65(c), that there is no likelihood that Defendant
24 will be wrongfully enjoined or restrained by the issuance of this TRO, and therefore does not
25 require Plaintiff to give security.

26 4. To provide Defendant adequate time to prepare a response to Plaintiff's TRO
27 Application, and so the court has adequate time to review that response, the court finds pursuant to

1 Rule 65(b)(2) that good cause exists to extend the expiration date of this Order to **Tuesday March**
2 **14, 2017**, at the time of the conclusions of the hearing on this order.

3 5. Defendant Bayview is HEREBY ORDERED TO SHOW CAUSE in writing why a
4 preliminary injunction should not issue, no later than **March 7, 2017**. The court will hold a
5 hearing on this Order to Show Cause **on Tuesday, March 14, 2017 at 10:00 a.m.**, in Courtroom
6 4, 5th Floor, 280 South 1st St., San Jose, CA 95113.

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IT IS SO ORDERED.

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Dated: February 28, 2017

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EDWARD J. DAVILA
United States District Judge